

IVETTE VELEZ,)	
)	Case No.: 1:15-cv-00181-JEI-AMD
)	
Plaintiff,)	Motion Date: June 1, 2015
)	
v.)	
)	
CREDIT ONE BANK,)	
)	
Defendant.)	
)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF
HER OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS AND COMPEL ARBITRATION**

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1 Plaintiff, IVETTE VELEZ, by and through her counsel, Kimmel &
2 Silverman, P.C., respectfully submits this Memorandum of Law in Opposition to
3 Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth
4 below, the Court should deny Defendant's Motion.

5
6 **I. INTRODUCTION AND PROCEDURAL HISTORY**

7 Plaintiff commenced this lawsuit against the Defendant on January 9, 2015,
8 alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. §§ 227,
9 *et seq.* ("TCPA"). See Docket Entry No. 1. Defendant was served with the
10 Complaint on March 9, 2015 and filed this motion on April 20, 2015. See Docket
11 Entry Nos. 3 and 6. For the following reasons, Defendant's motion should be
12 denied:
13

- 14 (1) Plaintiff has stated a claim for relief under the TCPA.
- 15 (2) Defendant has the burden of establishing, by competent evidence the
16 existence of a valid and binding contract and that Plaintiff agreed to
17 the terms upon which Defendant relies in its assertion that Plaintiff
18 is subject to arbitration. The standard applied to Defendant's motion
19 is the same standard as that on a Rule 56 summary judgment
20 motion. Defendant has failed to meet its burden to establish the
21 existence of a binding and enforceable arbitration contract between
22 Plaintiff and Credit Once.
23
24
25

(3) Defendant has failed to produce any evidence that Plaintiff opened any account or that she was put on notice of the existence of any arbitration agreement; and

(4) Any existing arbitration clause is unconscionable.

II. STANDARD OF REVIEW

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff's case. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The issue is not whether the plaintiff will ultimately prevail at the end but only whether he should be entitled to offer evidence to support his claim. See Neitzke v Williams, 490 U.S. 319 (1989).

Under Rule 8(a)(2), a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." "This statement must 'give the defendant fair notice of what the plaintiff's claim is and the grounds up which it rests.'" Under this standard "a court confronted with a Rule 12(b)(6) motion 'may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Cepero-Rivera v. Faqundo, 414 F.3d 124, 129 (1st Cir. 2005) (quoting a series of Supreme Court precedents with respect to the rule) (internal citations omitted). The court must resolve all ambiguities in favor of the plaintiff Phillips v. County of Allegheny, 515 F.3d 224, 228 (3d. Cir. 2008). Even if the face of the pleadings

1 suggest that the chance of recover is remote, the court must allow the plaintiff to
2 develop the case. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 515 (2002).

3 Finally, when considering a motion to dismiss, “all facts set forth in the
4 plaintiff’s complaint are to be accepted as true and the court limits its
5 consideration to the pleadings and exhibits attached thereto.” Grossman v.
6 Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (internal quotation
7 marks omitted).

8
9 For a motion to compel arbitration to succeed the Court must find that both
10 “(1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within
11 the scope of that agreement.” Kirleis v. Dickie, McCamey & Chilcote, P.C., 560
12 F.3d 156, 160 (3d Cir. 2009) (citing Trippe Mfg. Co. v. Niles Audio Corp., 401
13 F.3d 529, 532 (3d Cir. 2005)). In the absence of an agreement by the parties to
14 submit the matter of arbitrability to the arbitrator, the question of whether or not a
15 dispute is arbitrable is one for the court. First Options of Chicago, Inc. v. Kaplan,
16 514 U.S. 938, 943 (1995). Among “questions of arbitrability” presumptively
17 reserved for a court, The Supreme Court has identified “dispute[s] about whether
18 the parties are bound by a given arbitration clause.” Howsam v. Dean Witter
19 Reynolds, Inc., 537 U.S. 79 (2002).

20
21 Despite the “liberal federal policy favoring arbitration agreements,” Moses
22 H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983);
23
24
25

1 “[a]rbitration is a matter of contract and a party cannot be required to submit to
2 arbitration any dispute which he has not agreed so to submit.” BG Grp., PLC v.
3 Republic of Argentina, 134 S. Ct. 1198, 1206, (2014) (quoting Steelworkers v.
4 Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)). “[U]nless the parties clearly
5 and unmistakably provide otherwise,” the decision as to whether the parties have
6 submitted a dispute to arbitration is a question for the Court. Howsam at 83.

8 In the Third Circuit, the “summary judgment standard is appropriate for the
9 District Court to determine arbitrability in a motion to compel arbitration. Par-
10 Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd, 636 F.2d 51, 54 (3d Cir. 1980)
11 (“Only when there is no genuine issue of fact concerning the formation of the
12 agreement should the court decide as a matter of law that the parties did or did not
13 enter into such an agreement.”) As in the case of any other summary judgment, a
14 district court considering the making of an agreement to arbitrate, “should give to
15 the opposing party the benefit of all reasonable doubts and inferences that may
16 arise.” Id.

19 As discussed below, Plaintiff has stated a claim for relief under the TCPA,
20 and Defendant has failed to present evidence sufficient to carry its burden under
21 Rule 56 to prove the existence of an enforceable agreement to arbitrate.
22 Accordingly, Defendant’s Motion to Dismiss and Compel Arbitration should be
23 denied.
24
25

1 **III. ARGUMENT**

2 **A. Plaintiff has stated a claim under the TCPA**

3 In response to voluminous complaints regarding abuses of telephone
4 technology resulting in invasions of privacy, Congress passed the TCPA which
5 authorizes private causes of actions for certain specified conduct, and directs the
6 Federal Communications Commission (FCC) to implement regulations
7 concerning other conduct. Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 744
8 (2012).
9

10 Under varying circumstances the TCPA restricts calls initiated to: (1)
11 emergency telephone lines, (2) hospital rooms, (3) any telephone where the called
12 party is charged for the call, (4) residential telephones, and (5) business
13 telephones. See 47 U.S.C. §§ 227(b)(1)(A)(i)-(iii); 227(b)(1)(B), and
14 227(b)(1)(D). Here the provision that applies to Plaintiff's claims is §
15 227(b)(1)(A)(iii), which makes it unlawful "to make any call using any automatic
16 telephone dialing system or an artificial or prerecorded voice to any telephone
17 number assigned to a...cellular telephone service...or any service for which the
18 called party is charged for the call."
19
20
21

22 Here as pled in Plaintiff's Complaint, Defendant initiated telephone calls
23 through the use of an automatic telephone dialing system and automatic and/or
24 prerecorded messages that identified Defendant as the caller. See Docket Entry
25

No. 1 ¶15-16. Those calls were initiated to Plaintiff's cellular telephone, which meant Plaintiff was charged for every one of Defendant's calls. Id. at ¶12. Finally, Plaintiff revoked consent for Defendant to call that phone number, and Defendant heard and acknowledged Plaintiff's revocation of consent and demand to stop calling her cellular telephone, but continued to call her on her cellular telephone. Id. at ¶18-20. See *e.g.* Forrest v. Genpact Servs., LLC, 3:12-CV-2249, 2013 WL 4516479 (M.D. Pa. 2013) ("Because communications made in an attempt to collect a debt to a cellular phone are not exempt from the TCPA, and because the plaintiff has alleged that the defendant made calls to her cell phone, Defendant's motion to dismiss...will be denied."). Thus, Plaintiff has stated a claim under the TCPA.

B. Defendant has failed to meet its evidentiary burden to prove the existence of an enforceable arbitration agreement.

It is well established that arbitration is contractual in nature. The United States Supreme Court has held that, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985). Whether an agreement to arbitrate exists is to be decided based on normal contract formation and construction principles. Granite Rock Co. v. Int'l Bhd of Teamsters, 130 S. Ct. 2847, 2855-56 (2010) (When deciding whether the parties agreed to arbitrate a certain matter...courts generally...should apply

1 ordinary...principles that govern the formation of contracts,” citing First Options
 2 of Chicago, Inc. v. Kaplan, 514 U.S. at 944). Normal rules of contract formation
 3 and construction are not displaced by the Federal Arbitration Act. Indeed,
 4 “arbitrators derive their authority to resolve disputes only because the parties have
 5 agreed in advance to submit such grievances to arbitration.” Granite Rock Co.,
 6 130 S. Ct. at 2855-56. As such parties cannot be compelled to arbitrate absent an
 7 agreement to do so. Century Indem. Co. v. Certain Underwriters at Lloyd’s,
 8 London subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646,
 9 584 F.3d 513, 524 (3d Cir. 2009), citing U.S. Small Bus. Admin. V. Chimicles,
 10 447 F.3d 207, 209 (3d Cir. 2006). Consequently, in determining whether there is
 11 an agreement between the parties to arbitrate a claim, the Court must apply
 12 normal contract formation and construction principles. As discussed below there
 13 is no credible or convincing evidence to support Defendant’s contention that there
 14 exists a binding and enforceable contract to arbitrate.

15
 16 In determining whether the parties entered into a valid agreement to
 17 arbitrate, courts “turn to ‘ordinary state law principles that govern the formation
 18 of contracts.’” Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160
 19 (3d Cir.2009) (quoting First Options of Chic., Inc. v. Kaplan, 514 U.S. 938, 944
 20 (1995)). The United States Supreme Court has repeatedly directed that “[i]n areas
 21 of traditional state regulation, we assume that a federal statute has not supplanted
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1 state law unless Congress has made such an intention ‘clear and manifest.’” Bates
 2 v. Dow Agrosciences, 544 U.S. 431, 448-449 (2005) (internal citations omitted).
 3 Here as it is undisputed that Plaintiff is a New Jersey resident; New Jersey law
 4 must govern whether a contract with an arbitration clause exists.

5
 6 In New Jersey, “[p]arties are not required to arbitrate when they have not
 7 agreed to do so.” Atalese v. U.S. Legal Services Group, L.P., 219 A.3d 306, 313
 8 (N.J. 2014). State law provides that in order to create an enforceable contract the
 9 parties must “agree on essential terms and manifest an intention to be bound by
 10 them.” Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). An arbitration
 11 clause is subject to the same scrutiny as any other provision that requires a party
 12 to waive its legal rights: “courts take particular care in assuring the knowing
 13 assent of both parties to arbitrate, and a clear mutual understanding of the
 14 ramifications of that assent.” NAACP of Camden County East v. Foulke
 15 Management Corp., 24 A.3d 777, 790-791 (N.J. Super. Ct. App. Div. 2011). New
 16 Jersey law requires a “meeting of the minds” and a “consensual understanding”
 17 that the parties are agreeing to waive their access to the courts. Id. Such a
 18 contractual term must be “sufficiently clear to a reasonable consumer,” and
 19 waiver must be “clearly and unmistakably established.” Atalese, 219 A.3d at 309-
 20 314. Finally, the party who contests the making of such an agreement has the right
 21 to have the issue presented to a jury. Guidotti v. Legal Helpers Debt Resolution,

1 L.L.C., 716 F. 3d 764, 771 (3d Cir. 2013), citing Par-Knit Mills, Inc. v.
2 Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

3 Defendant has failed to present sufficient evidence that Plaintiff knowingly
4 agreed to arbitration. Defendant has produced evidence of two documents
5 allegedly mailed to Plaintiff. With respect to the first, Defendant relies on the
6 affidavit of Gary Harwood, Vice President of Portfolio Services at Credit One
7 Bank, N.A., who states that “[i]n August 2013 the Plaintiff was sent a written
8 solicitation for a pre-approved credit card with a unique reservation number of
9 FD18-BD24-MWFG,” and a “sample” of the solicitation sent to Plaintiff, that
10 does not contain Plaintiff’s name, address, solicitation number or signature. See
11 Docket Entry No. 6 Exhibits A, A-1. Exhibit A-1 contains an unsigned signature
12 block that reads:
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14
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16 “By signing/submitting this Acceptance Certificate, I
17 acknowledge I have read the terms and conditions on both sides
18 of this letter and the offer letter, and agree to be bound by those
19 terms.”

20 Defendant does not produce a version of this agreement signed by Plaintiff or
21 returned by Plaintiff to Credit One. In fact, Defendant has not provided any
22 evidence that Exhibit A-1 was ever signed or submitted by Plaintiff or that Exhibit
23 A-1 contains terms and conditions to which Plaintiff agreed.

24 Moreover, with respect to the issue of arbitration, Exhibit A-1 merely
25 states:

1 “You and we agree that either you or we may without the other’s
2 consent require that any dispute between you and us be submitted to
3 mandatory binding arbitration. A more detailed description of this
4 Arbitration Agreement will be sent with your card. See Docket No. 6,
5 Exhibit A-1.

6 Even assuming Plaintiff signed and returned to Credit One a document similar to
7 Exhibit A-1, Defendant would not have presented evidence sufficient to prove
8 “consensual understanding” under New Jersey law. In New Jersey parties cannot
9 mutually assent to a written agreement waiving their statutory rights unless the
10 agreement contains language that explicitly states that they are waiving those
11 rights Atalese, 99 A.3d at 309. Nevertheless, all facts considered in the light most
12 favorable to the Plaintiff, defendant’s evidence falls well short of proving any
13 agreement to the terms of its arbitration agreement.

14 Defendant has similarly failed to submit evidence to show that Plaintiff
15 agreed to the terms in Exhibit A-2. Other than its self-serving conclusory
16 statements that “Plaintiff accepted and made charges to the Account,” and
17 “Plaintiff also made payments towards the Account,” Defendant provides no
18 documentation showing Plaintiff’s written acceptance of the terms and conditions
19 of a credit card, any use of the credit card, and/or any payments on the account.
20 Exhibit A-2 contains no name, address, account number or reservation number,
21 and most importantly no signature or acknowledgment of receipt by Plaintiff.
22 There is no competent evidence to establish that Exhibit A-2 was sent to Plaintiff
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24
25

1 and similarly there is no evidence to suggest that Plaintiff and Defendant reached
 2 a “consensual understanding” as to the waiver of Plaintiff’s statutory rights.
 3 Concluding that Plaintiff and Defendant arrived at a meeting of the minds simply
 4 because a document may have been mailed to Plaintiff requires several inferences
 5 in favor of defendant, all of which are inappropriate in the context of deciding a
 6 motion to dismiss or a motion for summary judgment. Further, under New Jersey
 7 law there can be no mutual assent to contract provisions waiving statutory or
 8 constitutional rights absent some affirmative acknowledgement on behalf of a
 9 party who is claimed to have waived those rights. Because Defendant has failed to
 10 provide any evidence as to Plaintiff’s understanding and acceptance of its
 11 arbitration clause Defendant’s motion should be denied.
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14
 15 **C. Assuming arguendo that Defendant has proven the existence of**
 16 **an enforceable contract, the arbitration clause is**
 17 **unconscionable.**

18 Even if an arbitration clause made its way to Plaintiff, such clause is
 19 unconscionable and therefore unenforceable. New Jersey courts will find that a
 20 contract is “procedurally unconscionable” where there is unfairness in the
 21 formation of the contract. Guidotti v. Legal Helpers Debt Resolution, L.L.C., No.
 22 CIV.A. 11-1219 JBS, 2014 WL 6863183, at *11 (D.N.J. Dec. 3, 2014). A court
 23 will look for the presence of “hidden or unduly complex contract terms,
 24 bargaining tactics, and the particular setting existing during the contract formation
 25

process”, in addition to unequal bargaining power between the parties and the adhesive nature of a contract. Id. at 11. A contract is substantively unconscionable where the exchange of obligations is substantially one-sided. Id. In analyzing whether a contract is unconscionable New Jersey courts weigh both procedural and substantive unconscionability on a sliding scale; they do not require any particular threshold of each kind of unconscionability but apply a flexible standard. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 923 (N.J. Super. Ch. Div. 2002).

Here Defendant seeks to enforce a clause that is buried on the penultimate page of an adhesive contract full of convoluted legal terms in tiny print that requires Plaintiff to waive both statutory and constitutional rights. The design of the document is in no way calculated to reach a meeting of the minds between Defendant and a reasonable consumer with respect to its terms. Additionally, Defendant reserves itself the right to change any of the terms of the contract at any time, presumably even that of the arbitration clause, and grants no such right to Plaintiff. In another part of the contract the arbitration clause is described as discretionary rather than mandatory, stating that claims “may” be subject to mandatory arbitration not that they “will” be. Assuming that it was received at all, viewing all facts in the light most favorable to the Plaintiff and making all reasonable inferences in her favor, the evidence presented by Defendant is

1 insufficient to find an enforceable agreement as to the arbitration clause in Exhibit
2 A-2.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Defendant has failed to meet its burden under
5 Fed. R. Civ. P. 12(b)(6) as Plaintiff has stated a claim, and Defendant has failed to
6 meet its burden under Fed. R. Civ. P. 56 to establish the formation and existence
7 of an enforceable arbitration contract. Consequently the Court should deny
8 Defendant's Motion.
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13 Respectfully submitted,

14 Dated: May 18, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Memorandum of Law in Support of Her Opposition to Defendant's Motion to Dismiss and Compel Arbitration was served upon the following, via electronic mail and via first class mail, on May 18, 2015.

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